STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOSEPH IRWIN HUGGINS,

Defendant-Appellant.

UNPUBLISHED
February 14, 2006

No. 257264
Saginaw Circuit Court
LC No. 04-024004-FH

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering, MCL 750.110. The trial court sentenced him as a fourth habitual offender, MCL 769.12, to forty-six months to ten years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that insufficient evidence supports his conviction. We disagree. This Court reviews this claim de novo. In doing so, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

The elements of breaking and entering a building with intent to commit larceny, MCL 750.110, are: "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Cornell*, 466 Mich 335, 360; 646 NW2d 127 (2002). "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996).

The prosecutor's main witness, Maggie Borst, testified that she, her husband Jeffrey Hall, defendant, and Neil Pierce met at her apartment with the intention of stealing money from a school. She said they drove to the school and she remained in the car while the three men went around to the side of the building wearing gloves. Borst also said defendant came back to the car about five minutes before Hall and Pierce exited the school through the double doors. She said the three men produced manila envelopes containing thirty-three dollars and an insulin kit, and the four of them used the stolen money to buy gas, food, and cigarettes.

In a transcribed conversation with police, defendant admitted going to the school, but insisted that he and Borst remained inside the car. Defendant said approximately twenty minutes later, Pierce and Hall exited the building with manila envelopes containing approximately thirty dollars. Defendant said they drove to a store where the other three people used the stolen money to buy cigarettes and gas while he used his own money.

Here, the evidence conflicts in regard to defendant's actions after arriving at the school and Borst's credibility is clearly an issue. However, "[t]his Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004), citing *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Viewing the evidence in a light most favorable to the prosecution, a rational jury could have found that defendant broke into the school with the intent to take money that did not belong to him. Thus, there was sufficient evidence to support defendant's conviction of breaking and entering.

Defendant next claims the trial court deprived him of a fair trial by allowing an officer to summarize a taped conversation with defendant, by refusing to redact portions of defendant's statement where he referred to "additional crimes," and by failing to take action, sua sponte, in response to the prosecutor's alleged instances of misconduct. We disagree.

This Court reviews a trial court's evidentiary ruling for an abuse of discretion. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Id.*

Michigan Rule of Evidence 1002 provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." However, MRE 103(a) also provides, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Therefore, an evidentiary error does not merit reversal in a criminal case unless it affirmatively appears that it is more probable than not the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000), rem'd 465 Mich 931, on rem 249 Mich App 728; 643 NW2d 607 (2002).

In this case, regardless of whether the court erred in allowing the detective to summarize defendant's statement to the police, any error that might have occurred was harmless because the detective read the entire transcript to the jury. Therefore, regardless of whether the officer properly summarized defendant's statement, the jury heard defendant's explanation as to his level of involvement in the crime when the officer read the complete transcript. See *Lueth*, *supra* at 686-687.

Defendant also contends the court erred in denying his request to redact the following portion of the transcript wherein the police questioned defendant about the night's events:

> *Q*. Okay, we're not going to go into it, but I understand that you guys got into some trouble that night?

A. Yes.

Q. Into Saginaw, into --

A. Shiawassee.

Q. Shiawassee county? Okay. And some additional crimes were committed?

A. Yes.

The trial court, in denying defendant's request, held that defendant's reference to "additional crimes" constituted an admission of guilt to the instant crime. An "additional" crime suggests a previous crime was committed earlier that day. The only crime discussed was the instant offense, and, in admitting to committing "additional" crimes, defendant implicated himself in the commission of the instant offense. Accordingly, the court's admission of defendant's unredacted testimony was based in fact and logic and was not an abuse of discretion.

Defendant claims he was denied a fair trial as a result of numerous instances of prosecutorial misconduct. In order to preserve a claim of prosecutorial misconduct for appeal, defendant must object to the prosecutor's conduct. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159, lv gtd 472 Mich 928 (2005); *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Defendant did not object to any of the alleged instances of misconduct, and therefore, the issue was not preserved. This Court reviews unpreserved allegations of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.*

Generally, the standard for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court will review alleged instances of prosecutorial misconduct on a case-by-case basis, examine the record, and evaluate the prosecutor's remarks in context. *Thomas*, *supra* at 454; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

As an initial matter, defendant contends this Court should refrain from using a harmless error analysis. However, this is incorrect because as noted above, we review unpreserved allegations of prosecutorial misconduct for plain error affecting substantial rights. *Ackerman*, *supra* at 448-449.

Defendant first claims the prosecutor committed misconduct by misstating the law by degrading the presumption of innocence and effectively instructing the jury to weigh defendant's statement differently than statements by other witnesses by making various comments that defendant minimized his involvement in the crime. A prosecutor's uncorrected misstatement of

the law may deprive defendant of his right to a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

In this case, defendant does not contend, and there does not appear to be, a single instance where the prosecutor expressly mischaracterized the presumption of innocence, the burden of proof, or how the jurors should weigh the witness' credibility. The prosecutor explained that the judge was going to give the jury "an instruction about witnesses and how you can determine who you believe and who you don't believe." Therefore, rather than misstate the law, the prosecutor instructed the jury to follow the court's statement of the law.

Although defendant contends the misconduct resulted from inferences rather than express statements, the prosecutor's remarks must be read as a whole, and in light of defendant's remarks. See *Schutte*, *supra* at 721. In this case, defendant's theory was that although he was with the perpetrators and knew what they were going to do, he did not participate with them, counsel them, or encourage them. It was to this defense the prosecutor directed her comments that defendant was simply minimizing his involvement. Therefore, the prosecutor's statements regarding defendant's minimization of his involvement in the crime responded to the defense' theory.

Even if the prosecutor made improper remarks, the court provided the jury with a thorough list of instructions they were presumed to have followed. *Graves*, *supra* at 486; *Mette*, *supra* at 330-331. Specifically, the court instructed the jury it was the court's duty to instruct them on the law and they were to disregard any instruction on the law an attorney may have given. The court also explained that the accused was presumed innocent. The court also addressed how the jurors should regard defendant's statement to the police and what factors they should consider in weighing its credibility. Therefore, even assuming the prosecutor's remarks were improper, any error was harmless because the court instructed the jury on the areas of law defendant claims the prosecutor degraded.

Defendant next contends the prosecutor committed misconduct by improperly expressing personal beliefs as to the facts of the case. One of the ways defendant claims the prosecutor committed this error was by improperly verifying that the facts occurred as the witnesses were going to testify. On appeal, defendant claims the prosecutor said, "That's the testimony you are going to hear throughout the course of this trial *and* that's what happened" (emphasis added). However, the prosecutor actually said, "That's the testimony that you're going to hear throughout the course of this trial, *that that's* what happened, and you're going to hear it from the people who were actually involved in the breaking and entering" (emphasis added). Therefore, the prosecutor did not verify that the events occurred. Rather, the prosecutor was simply saying that the witnesses were going to explain how the events occurred. Accordingly, as the actual testimony revealed, the prosecutor did not insert her personal belief as to whether the events actually occurred.

Defendant also claimed the prosecutor improperly inserted her personal beliefs by telling the jury it could believe Borst. Although a prosecutor may not vouch for the credibility of a witness by implying he or she has some special knowledge that the witness testified truthfully, it is important to read the prosecutor's comment in context. See *Thomas*, *supra* at 454; *Noble*, *supra* at 660; *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) ("A prosecutor's comments must be considered in light of defense arguments."). During closing

arguments, defense counsel repeatedly questioned whether the jury could find Borst credible. In response, the prosecutor provided the jury with a number of reasons to believe Borst's testimony. Therefore, the prosecutor's statement regarding Borst's credibility was not in error because she was properly responding to defendant's attack on the witness' credibility. See *Thomas*, *supra* at 454; *Noble*, *supra* at 660; *Messenger*, *supra* at 181.

Additionally, defendant misquoted the prosecutor. On appeal, defendant claims the prosecutor said "the jury could believe Maggie 'because she was afraid of her husband and was telling the truth now.'" However, the prosecutor actually stated, "That's another reason you can believe her. . . . But when she came in here and testified and swore to tell the truth, she told you I'm under oath now, this is what happened, and I'll tell you why I didn't say what my husband did because I was afraid he would kill me." Therefore, the prosecutor was not vouching for the witness by confirming that Borst was truly afraid of her husband. Rather, the prosecutor was simply reviewing Borst's testimony that she was afraid of her husband. It is proper for the prosecutor to restate, or comment upon, the evidence presented. *Schutte*, *supra* at 721 (a prosecutor is permitted "to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case").

Defendant also argues the prosecutor improperly inserted her personal beliefs by stating that defendant was guilty. But this was part of the prosecutor's argument from the evidence, not a mere statement of personal opinion However, even assuming this remark was improper, it could have been cured by a curative instruction, and this Court will not find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586; *Schutte*, *supra* at 721. Additionally, the court instructed the jury that a "person accused of a crime is presumed to be innocent" and that the jury needed to "start with the presumption that the defendant is innocent." Therefore, even if the prosecutor's statement was improper, there was no plain error affecting a substantial right because the court stated the proper presumption of innocence.

Defendant next argues that the prosecutor committed misconduct when she failed to elicit testimony from Borst that properly described the plea agreement pursuant to which she was testifying. Defendant claims this testimony misrepresented the plea bargain because Borst's testimony implies there was no plea bargain and the judge ordered her to testify. However, contrary to defendant's claim, this testimony reveals that Borst said she "would come in and talk to a jury and tell them what happened." There is no indication that a judge ordered her to testify.

Even assuming the witness improperly characterized her plea bargain, any inaccuracies were addressed on cross-examination where Borst testified that she pled guilty to a larceny from a building and received a prison term. Borst also explained that part of the consideration for her testimony against the other individuals involved in the breaking and entering was that the prosecutor would dismiss the felony charge of breaking and entering. Therefore, there was no plain error because the jury was made aware of Borst's status as an accomplice and the terms of her plea bargain when they considered whether her testimony was credible. Accordingly, we find that the prosecutor did not commit prosecutorial misconduct by failing to reveal to the jury that Borst testified pursuant to a plea agreement.

Defendant next claims the prosecutor committed misconduct by eliciting from the detective that an unnamed informant gave the detective information that defendant was involved

in the breaking and entering. Defendant claims this testimony was hearsay, was more prejudicial than probative, and violated defendant's right to confront the unnamed witness. However, defendant does not explain how this statement constitutes hearsay or why it is more probative than prejudicial. Defendant cannot simply state that the conduct was improper and fail to explain how the rules of evidence apply to the facts. It is not the responsibility of this Court to make, or find support for, defendant's arguments. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

With regard to defendant's contention that the detective's testimony violated defendant's right to confront the witness because the detective did not name the informant, US Const, Am VI; Const 1963, art 1, § 20, defendant does not provide any evidence establishing that the information the detective received was, in fact, a witness' statement. The information could have been a piece of evidence found at the crime scene or Borst's statement already introduced into evidence. Therefore, defendant failed to provide any evidence that his right to confront the witness was applicable. Accordingly, we find that the prosecutor did not commit misconduct by introducing testimony of an alleged unnamed witness.

Defendant next contends the prosecutor committed misconduct by asking the detective whether he believed defendant was minimizing his involvement in the breaking and entering, thereby suggesting to the jury that the detective did not believe defendant was telling the truth. However, defendant does not argue, and there does not appear to be any evidence on the record, that the detective expressly stated he believed defendant was lying. Additionally, as explained above, the prosecutor's "minimization" theory was a response to defendant's assertion that he simply sat in the car and neither participated in, nor enjoyed the fruits of, the crime. Therefore, read in context, the prosecutor's questions to the detective were in response to defendant's assertions that he did not participate in the crime. See *Messenger*, *supra* at 181. Accordingly, we find that the prosecutor did not commit misconduct by improperly eliciting an officer's testimony.

Defendant next argues the prosecutor committed misconduct by improperly making statements of fact unsupported by the evidence. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Ackerman*, *supra* at 450. However, the prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte*, *supra* at 721;.

Defendant first claims the prosecutor stated a fact not in evidence when she said Borst remained in the car to assist in the perpetrator's escape. However, Borst testified that while she was sitting in the car, she watched to see if anyone else pulled into the parking lot. She explained that if anyone had pulled into the parking lot, she would have pounded on the doors and warned the people inside. Therefore, the prosecutor was simply making a reasonable inference from the evidence presented that Borst would have warned the perpetrators if anyone arrived who would have made their escape more difficult.

Defendant also claims there are no facts supporting the prosecutor's statement that Borst "put herself in harm's way with the law immediately." However, Borst testified that even during her first conversation with the police, she admitted she was in the car during the breaking and entering, she discarded evidence by throwing the envelopes out the window, and she enjoyed the

fruits of the crime by using the stolen money to buy cigarettes. Therefore, even though Borst later made additional statements to the police that indicated the full extent of her involvement in the crime, her original statement to the police was also incriminating.

Defendant also claims there were not facts supporting the prosecutor's comment that the perpetrators were a team. However, Borst testified that she, Hall, defendant, and Pierce made arrangements to meet, they went to the school with the intent to steal money, they drove in the same car, they arrived at the school together, the men left the car together, Borst watched to make sure no one else came to the school that night and was prepared to warn the men inside if someone came, they left the school together, and they spent the stolen money together. From this evidence, the prosecutor could properly argue the reasonable inference that the perpetrators were a team.

Defendant also contends there was insufficient evidence to support the prosecutor's statement that the nature of the crime required more than two people. However, the prosecutor never said the crime took more than two people; rather, the prosecutor said, "We know that it took more than one person." Additionally, as discussed above, Borst testified that she watched to make sure no one else drove up to the school and was prepared to notify the perpetrators inside the school if anyone appeared. Therefore, the prosecutor could have made the reasonable inference that this particular crime took more than one person, namely Borst acting as a lookout and whomever went inside to steal the money. Additionally, the detective testified that splinters were on the floor, the doorjamb was forced open, the file cabinets were disturbed and materials were strewn about the room. Based on the large amount of damage done to the school, it is also possible the prosecutor made the reasonable inference that more than one person was involved in breaking through the office door and searching through the cabinets.

Defendant further contends there was insufficient evidence to support the prosecutor's comment that defendant participated in the crime because he and Borst were close. However, Borst testified that although she and defendant were not related by blood, defendant was the closest thing to a brother she ever had. There was obviously a high level of comfort and familiarity between Borst and defendant, and therefore the prosecutor could have made the reasonable inference that the perpetrators were so close they felt comfortable committing a crime together.

Defendant also contends there was insufficient evidence to support the prosecutor's statement that Borst was willing to tell the jury what happened even though her statement put her in prison. Specifically, defendant argues there was no evidence as to whether the prosecution had sufficient evidence to convict Borst without her statement. However, regardless of whether the prosecutor had sufficient evidence to convict Borst without her confession, Borst did, in fact, confess willingly. As a result of this confession, the judge sentenced her to a term of incarceration. Therefore, the prosecutor properly stated the facts of the case.

Defendant contends there was insufficient evidence to support the prosecutor's statement that defendant "participated as much as everyone else." Borst testified that defendant traveled in the car to the school with everyone else, he exited the car with the other two men, he went around to the side of the building with the other two men, he and the other two men each produced manila envelopes upon returning to the car, and he used part of the stolen money to buy food. Defendant's level of involvement, as described by Borst, is equal to the level of

involvement of the other two men. Based on these facts, the prosecutor properly argued that defendant participated in the crime as much as the other two men.

Defendant also contends there was insufficient evidence for the prosecutor to pose the question, "Is [defendant] standing back there being the guard?" However, during closing arguments, defense counsel said there was no evidence defendant ever entered the building because Borst only testified that defendant got out of the car, went to the building, and came back. In response, the prosecutor stated, "Now, the defendant, did he go in, or didn't he go in? [Borst] told you she doesn't know. But she knows he's back there. She's the lookout in the front. Is he the lookout in the back? He's back there" (Tr II, 100). Therefore, the prosecutor's rhetorical question was in response to defendant's argument that there was no proof he actually entered the building. See *Messenger, supra* at 181. Accordingly, we find that the prosecutor did not commit misconduct by arguing facts not in evidence.

Defendant next contends the prosecutor committed misconduct when she repeatedly referred to defendant as a rat. The prosecutor may not denigrate a defendant, defense counsel, or the defense. *Bahoda, supra* at 283. However, a prosecutor may comment on the evidence presented, *Id.* at 282-283; *Thomas, supra* at 454, and argue from the evidence that a witness, including the defendant, is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Additionally, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence during closing argument, particularly where conflicting testimony exists. *Thomas, supra* at 455. This Court will consider the prosecutor's comments in light of defense counsel's comments. *Watson, supra* at 592-593; *Messenger, supra* at 181.

The prosecutor's language, while sometimes harsh, was aimed at the evidence presented that defendant told the police Hall and Pierce were solely responsible for the break-in and defendant explained how the men broke into the school, what they took, and who spent the stolen money. Essentially, the prosecutor's comment that defendant was a "rat" was a commentary on the evidence presented that defendant had "ratted" out his friends. *Bahoda, supra* at 282; *Schutte, supra* at 721. Although the prosecutor could have summarized this argument using different language, the prosecutor is not required to confine her arguments to the blandest of terms and can use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Additionally, the prosecutor's comments were in response to the credibility contest between Borst and defendant. As defendant commented during his closing argument, "So we end up having to decide who is telling the truth, and we only have two people that are talking about it. It's Ms. Borst and the defendant." Defendant attempted to discredit Borst by eliciting testimony that she lied to the police, she was involved in the breaking and entering, she was a convicted felon, and she was testifying pursuant to a plea agreement. The prosecutor responded by arguing that defendant's credibility was also questionable because he told the police his friends were responsible for the break-in and essentially "ratted" them out. Therefore, the prosecutor's comment that defendant was a "rat" was in response to the credibility contest between defendant and Borst. Viewed in the context of the evidence presented at trial, and in light of defendant's defense theory, the prosecutor's comments in this regard were not improper. Additionally, the court gave the jury an instruction that arguments by attorneys are not evidence.

Therefore, any prejudice that may have occurred was reduced or eliminated by the court's instruction.

Defendant next contends the prosecutor committed misconduct by improperly making civic duty arguments. Defendant points to the prosecutor's following closing remarks:

> He was part of the plan from the beginning. He stuck through it to the end during the plan. He was part of it. And then he enjoyed the benefits of the breaking and entering. He is guilty of committing that breaking and entering, and that's what needs to be told to him through your jury deliberation and then verdict. You need to tell him you're guilty, you're responsible, what you did was breaking and entering.
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> * * *
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> He is guilty. He needs to take responsibility for what he did, and that's what your verdict of guilty does. It tells him you're responsible. You're an adult. Take responsibility for your actions. That's what a verdict of guilty will do, and that is what we're asking for.

A prosecutor may not make a civic duty argument that appeals to the fears and prejudices of the jurors because such arguments inject broader issues than the guilt or innocence of the accused. *Bahoda, supra* at 282, 284. Read in context, the prosecutor's closing remarks focused on the prosecutor's theory, the facts to support the theory, and defendant's guilt. There were no broader issues involved. On appeal, defendant's sole argument is that the comments implied that a guilty verdict would make defendant a better person by making him take responsibility for his actions. However, even assuming this inference is the type the courts have sought to prevent, any prejudice was cured when the trial court instructed the jury that the attorneys' arguments were not evidence, the arguments were only meant to help the jury understand the evidence and each side's theories, and the jury should only base its verdict on properly admitted evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, we find that the prosecutor did not commit misconduct by improperly making civic duty arguments.

Finally, defendant argues the cumulative error of the prosecutor's alleged misconduct constituted reversible error. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, as explained above, if there was any error, it was corrected by the court's thorough instructions to the jury. See *Abraham, supra* at 279. Accordingly, we find that none of the alleged errors seriously prejudiced defendant, and he was not denied a fair trial.

Defendant contends the court erred in failing to take independent action in response to the above alleged instances of prosecutor misconduct. However, as discussed, there are no instances of prosecutorial misconduct; and if any error did occur, the judge provided a thorough list of instructions the jurors were presumed to have followed. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713

(2000). Accordingly, we find that the trial court did not err by failing to take independent action in response to the prosecutor's alleged instances of misconduct.

Defendant next argues that trial counsel provided ineffective assistance of counsel. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. . . . [A] trial court's findings of fact are reviewed for clear error. . . . Questions of constitutional law are reviewed . . . de novo." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002).

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, §20. Effective assistance of counsel is presumed, and any defendant seeking to prove otherwise bears a heavy burden. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994) (adopting the *Strickland* test). Deficient assistance of counsel occurs when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra*.

Defendant's sole argument on appeal, with regard to ineffective assistance of counsel, is that defense counsel was ineffective for failing to object to the instances of prosecutorial misconduct alleged above. However, as discussed above, there do not appear to be any instances of prosecutorial misconduct. Additionally, the court provided the jury with a thorough set of instructions, many of which addressed the issues raised by defendant on appeal. Because there do not appear to be any instances of prosecutorial misconduct, any objections defense counsel would have made would have been meritless. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley* (*On Remand*), 468 Mich 135, 142; 659 NW2d 611 (2003). Accordingly, we find that defense counsel did not provide ineffective assistance.

Defendant preserved the issue of whether his conviction was against the great weight of the evidence by filing a motion for a new trial and/or evidentiary hearing and arguing, in relevant part, that the conviction was against the great weight of the evidence. This Court reviews a denial of such a motion for an abuse of discretion. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Abraham*, *supra* at 269.

The Michigan Supreme Court addressed the standard for granting motions for a new trial on the basis that the conviction is against the great weight of the evidence in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The Court held that "[a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 627. The Court noted, "the issue of credibility of the witnesses is implicit in determining great weight" but expressed its disfavor with courts granting new trial motions "based solely on the weight of the evidence regarding witness credibility[.]" *Id.*, 638-639. The Court noted the importance of giving great deference to a jury's determination as to findings of facts and determinations of witness credibility:

> We align ourselves with those appellate courts holding that, absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof. We reiterate the observation . . . that, when testimony is in direct conflict and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury. [*Id.* at 642-643 (citation omitted).]

The Court provided a number of examples of the kind of exceptional circumstances that would justify a court granting a motion for a new trial where the issue was witness credibility: where the testimony "contradicts indisputable physical facts or laws," "where testimony is patently incredible or defies physical realities," "where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," or "where the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id.* at 643-644 (citations omitted). The Court further noted, "If the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions, the judge may not disturb the jury findings although his judgment might incline him the other way." *Id.* at 644.

Defendant does not claim, and there do not appear to be, any of the circumstances the *Lemmon* Court listed that would justify the trial court overturning the jury's determination as to the credibility of the witnesses. Rather, Borst's testimony, although it directly conflicted with defendant's statement to the police, was plausible, it did not contradict indisputable facts or laws, and it did not defy physical realities. See *Id.* at 643-644. The issue before the jury was simply a matter of credibility, and we will not disturb the jury's determination as to witness' credibility even where the evidence is nearly balanced. *Id.* at 644. Accordingly, we find that defendant's conviction should not be reversed because it was not against the great weight of the evidence.

Defendant finally argues that the trial court erred by denying his motion for a new trial. This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Because defendant simply reiterates arguments we have previously rejected, we conclude that he has not shown that the trial court abused its discretion by denying his motion for a new trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis